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# SEPARATION OF POWERS, JUDICIAL AUTHORITY, AND THE SCOPE OF ARTICLE III: THE TROUBLING CASES OF *MORRISON* AND *MISTRETTA*\*

*Martin H. Redish*\*\*

## I. INTRODUCTION: THE VALUES OF SEPARATION OF POWERS IN THE JUDICIAL CONTEXT

While the Supreme Court has long expressed a disturbing willingness to allow the "judicial power" of article III<sup>1</sup> to be exercised by government officials lacking the status of article III judges,<sup>2</sup> the Court has traditionally resisted direct validation of the use of the article III courts for the performance of functions outside the scope of article III.<sup>3</sup> Indeed, several Justices have strongly resisted the vesting of authority in the article III courts to adjudicate cases falling outside the bounds of the categories enumerated in

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1. Article III provides in part that:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at all stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art. III, § 1.

2. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 857 (1986) (federal agency's jurisdiction to adjudicate state law counterclaims in reparations proceedings does not contravene either separation of powers or article III); *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 594 (1985) (Congress has authority to require arbitrators to adjudicate disputes under Federal Insecticide, Fungicide, and Rodenticide Act without violating article III).

3. The Court has asserted that:

The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity 'to adjudge the legal rights of litigants in actual controversies.' . . . The requirements of Art. III are not satisfied merely because a party requests a court of the United States to declare its legal rights.

*Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Liverpool S.S. Co. v. Comm'r of Emigration*, 113 U.S. 33, 39 (1885)). See also *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 647 (1949) (Frankfurter, J., dissenting) ("According to Article III only 'judicial power' can be 'vested' in the courts established under it.").

article III, section 2,<sup>4</sup> for fear that the performance of nonjudicial functions might logically follow.<sup>5</sup>

What, might one ask, would be so terrible about allowing article III courts to perform nonjudicial functions—in other words, tasks not directly involving the adjudication of a live dispute? Initially, one might point to the complete absence of any textual authorization for the judicial performance of such nonjudicial functions.<sup>6</sup> Ours is supposedly a government of both separated and limited powers.<sup>7</sup> With only limited and arcane exception,<sup>8</sup> constitutional authorization for federal judicial action is confined to the vesting of the

4. Article III, section 2 specifically enumerates the areas of law in which the federal judiciary may adjudicate. In part, it provides that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

5. Most notably, Justice Frankfurter feared that:

[I]f courts established under Article III can exercise wider jurisdiction than that defined and confined by Article III, and if they are available to effectuate the various substantive powers of Congress . . . what justification is there for interpreting Article III as imposing one restriction in the exercise of those other powers of the Congress—the restriction to the exercise of “judicial power” . . . .

National Mutual Ins. Co. v. Tidewater Transfer Co. 337 U.S. 582, 648 (1949) (Frankfurter, J., dissenting). See also *id.* at 616 (Rutledge, J., concurring in judgment) (“If Article III were no longer to serve as the criterion of district court jurisdiction, I should be at a loss to understand what tasks, within the constitutional competence of Congress might not be assigned to district courts.”).

6. See U.S. CONST. art. III, §§ 1, 2.

7. The text of the United States Constitution does not explicitly refer to the principle of separation of powers. Instead, separation of powers may be inferred because the legislative, executive, and judicial powers are described and authorized by three separate and distinct articles of the Constitution. Springer v. Philippine Islands, 277 U.S. 189, 201 (1928). See also Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 221 (1988) (text does not invoke separation of powers as a principle but implies a notion of distinct branches).

Professor Casper has observed that James Madison proposed a new article VII “to precede the existing [article]” which would have explicitly formulated the separation of powers principle. The proposed article stated:

The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.

*Id.* at 221 (quoting 12 THE PAPERS OF JAMES MADISON 202 (C. Hobson & R. Rutland eds.

"judicial power" in the federal courts and the extension of that power only to the adjudication of specified "cases" or "controversies."<sup>9</sup>

In most cases of constitutional analysis, however, resort to a purely linguistic examination of text has failed to be dispositive in judicial construction.<sup>10</sup> Whether Congress may authorize or direct the article III courts to perform nonjudicial functions, then, is likely to be resolved by considerations which go beyond examination of constitutional language. Rather, it probably will be resolved by examination of the structural, theoretical and political underpinnings of the concept of the separation of powers, specifically in the judicial context, as well as by textual examination.

1979)). However, while the House of Representatives adopted Madison's proposal in 1789, the Senate rejected it "for reasons we shall never know." *Id.* at 222.

8. The one exception was the validation of the use of article III courts for nonadjudicatory purposes in *O'Donoghue v. United States*, 289 U.S. 516 (1933). The *O'Donoghue* Court held that even though the Court of Appeals of the District of Columbia was an article III court, Congress could exercise its constitutional power under article I, section 8 to confer on that court administrative duties without violating article III. However, *O'Donoghue* is the exception because it concerned federal courts within the District of Columbia, which, rightly or wrongly, have often been considered unique. See, e.g., *Palmore v. United States*, 411 U.S. 389, 400-04 (1973) (criminal defendants in the District of Columbia have no constitutional right to be tried before an article III judge).

9. U.S. CONST. art. III, § 2, cl. 1.

The two words—cases and controversies—are characterized by "an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." *Flast v. Cohen*, 392 U.S. 83, 94 (1968). Chief Justice Warren continued:

Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

*Id.* at 94-95. See also *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980) (a case must be capable of judicial resolution, which is characterized by "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions."); *Muskra v. United States*, 219 U.S. 346, 356-57 (1911) ("The term 'controversies,' if distinguishable at all from 'cases' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature") (citing *In re Pacific Ry. Comm'n*, 32 F. 241, 255 (1887)).

Justiciability, however, is neither a "fixed concept" nor "susceptible of scientific verification." *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (plurality opinion). Generally, whether an issue is justiciable may be determined in a negative fashion: "no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action." *Flast*, 392 U.S. at 95 (footnotes omitted).

10. See generally Redish & Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 21 (1987) ("It would be fanciful to suggest that resort to constitutional text could by itself resolve many constitutional disputes.").

Among the three distinct branches of the federal government, the judiciary is of course unique, because of its consciously chosen, carefully protected unrepresentativeness.<sup>11</sup> The judiciary's unrepresentativeness in our constitutional democracy simultaneously dictates both powers<sup>12</sup> and limitations.<sup>13</sup> On the one hand, if the judiciary is to serve as an effective check and enforcer of counter-majoritarian constitutional norms against the representative branches, its integrity and independence must be shielded from undermining by those branches.<sup>14</sup> On the other hand, because the judiciary is unrepresentative, it is important that its functioning be confined to the performance of the traditional judicial function of adjudication,<sup>15</sup> lest the judiciary be in a position to usurp the function and authority of the political branches.<sup>16</sup>

11. In order to protect the independence of the judiciary, the Constitution provides that federal judges shall receive life tenure during "good behavior." U.S. CONST. art. III, § 1. Alexander Hamilton, a staunch advocate of the Constitution, argued that guaranteeing a member of the judiciary a permanent office served as:

[T]he best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws . . . nothing can contribute so much to [the judiciary's] firmness and independence as *permanency in office*, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure, as the *citadel* of the public justice and the public security.

THE FEDERALIST No. 78, 396-97 (A. Hamilton) (M. Beloff 2d ed. 1987) (emphasis in original).

12. See, e.g., Redish & Drizin *supra* note 10, at 17 ("[T]he judiciary is . . . obligated to invalidate actions of the majoritarian branches that exceed constitutional limits.").

13. See, e.g., *id.* ("[T]he judiciary derives no logical authority to invalidate the actions of the legislative or executive branches on grounds other than inconsistency with constitutional dictates.").

14. Because of its "natural feebleness," the judiciary was considered to be "the weakest of the three departments of power . . . [and] in continual jeopardy of being overpowered, awed or influenced by its co-ordinate branches." THE FEDERALIST No. 78, *supra* note 11, at 396-97 (A. Hamilton). Hamilton warned, however, that although the judiciary presented "the least danger[ ] to the political rights of the constitution," such a scenario could continue only "so long as the judiciary remains truly distinct from both the legislature and executive." *Id.* at 396-97.

Hamilton continued:

"[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers." [citation omitted] . . . liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; . . . . The complete independence of the courts of justice is peculiarly essential in a limited constitution.

*Id.* at 397.

15. See, e.g., U.S. CONST. art. III, § 2, cl. 1 (limiting judicial power to "all Cases . . . arising under this Constitution").

16. See, e.g., THE FEDERALIST No. 78, *supra* note 11, at 399 (A. Hamilton). Hamilton expressed a concern that the judiciary not replace the will of the politically accountable legislative and executive branches with its own. He observed that "[t]he courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body." *Id.* (emphasis in original).

James Madison agreed. Quoting the French philosopher Montesquieu, Madison argued:

When the legislative and executive powers are united in the same person or body

Paradoxically, vesting authority in the judiciary to perform tasks that are wholly legislative, executive, or administrative in nature, simultaneously endangers both of the political values served by the judicial separation of powers. Requiring the judiciary to perform tasks beyond the scope of case adjudication may threaten its integrity by blurring its special place within the governmental structure. An article III court reduced to acting as a mere administrative functionary that assists or serves the political branches may have difficulty commanding the prestige necessary to check the exercise of majoritarian will found to conflict with constitutionalized values. Yet ironically, the judicial exercise of purely legislative or executive power, untied to the adjudicatory mold, may threaten fundamental democratic values by effectively allowing the one unrepresentative branch of government to perform the starkly political functions reserved for those branches most directly responsible to public will.

Of course, it will often be impossible to predict, with any degree of certitude, that exercise of a particular nonjudicial function by the article III judiciary will significantly undermine the fundamental political values of self-determination or constitutionalism. Generally, the danger is an incremental one: eventually the judicial branch will either have acquired an excess of authority or will have lost much of its requisite integrity, but no single breach could be attributed responsibility for the overall harm. It is presumably for that very reason that separation of powers protections are largely prophylactic in nature: they are designed to prevent damage to the political framework before the truly serious harm intended to be avoided can occur.<sup>17</sup>

It is for these reasons that the recent trend evinced in Supreme Court separation of powers doctrine should be viewed with considerable concern, if not alarm. In two recent major decisions, *Morrison v. Olson*<sup>18</sup> and *Mistretta v. United States*,<sup>19</sup> the Court indicated a troubling willingness to rationalize and justify unambiguous breaches of the concept of judicial separation of powers that in themselves are far from de minimis. More importantly, by adopting an analytical model that is little more than intellectually bankrupt, the Court has failed to meet its obligation to provide at least minimally workable and predictable constitutional standards. As a result, the Court has undermined the separation of powers principle as an effective prophylactic tool for assuring the appropriate interaction of the different branches.

Before the full doctrinal impact of the Court's recent decisions may be appreciated, however, it is first necessary to understand the conceivable

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... there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should enact tyrannical laws to execute them in a tyrannical manner. . . . Were the power of judging joined with the legislative, the life and the liberty of the subject would be exposed to arbitrary control, for *the judge* would then be the *legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of an *oppressor*.

THE FEDERALIST NO. 47, *supra* note 11, at 247 (J. Madison) (emphasis in original).

17. See *supra* notes 14-16 and accompanying text.

18. 108 S. Ct. 2597 (1988).

19. 109 S. Ct. 647 (1989).

analytical models available to the Court in ruling upon separation of powers issues. Therefore, the next section of this Article is devoted to such an examination. The following section will discuss the facts and holdings of both *Morrison* and *Mistretta*; at that point, the Article will critique the Court's logic in both cases. The final section of the Article suggests an alternative approach to those issues that more appropriately protect the constitutional values of separation of powers.

## II. CONSTITUTIONAL SEPARATION OF POWERS: ALTERNATIVE ANALYTICAL MODELS

The fact that separation of powers represents an important protection of our constitutional democratic system does not automatically imply adoption of a rigid demarcation of authority among the branches.<sup>20</sup> While this of course presents one interpretational option it is only rarely that constitutional directives are so rigidly enforced.<sup>21</sup> In fact, there appear to be three broad analytical models by which the Court conceivably could interpret the separation of powers dictates: the "Formal Separationist" model, the "Flexible" model or the "Total Deferential" model.

### A. The "Formal Separationist" Model

It is conceivable, because of both the importance of the separation of powers concept and the doctrinal quagmire that might follow adoption of a less rigid analysis, that a reviewing court could adopt a model which would erect a wall among branches: no branch may exercise power conceptually classified as belonging to another branch. Thus, the judiciary could not exercise power defined as legislative, the legislature could not exercise power categorized as executive, and the executive could not exercise power characterized as judicial.<sup>22</sup>

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20. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

21. It has been suggested that the

Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the "plain meaning" of the Constitution's text or to the subjective intention of the Framers. The Constitution is not a deed setting forth the precise metes and bounds of the subject matter; rather it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.

*Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 789 (1986) (White, J., dissenting). But see Redish & Drizin, *supra* note 10, at 21.

22. Such a strict view was advocated by Montesquieu. Madison described the French philosopher's view of the separation of powers as "amount[ing] to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." THE FEDERALIST NO. 47, *supra* note 11, at 247 (J. Madison).

The Court has rarely attempted to enforce such rigid lines of demarcation between the legislative and executive branches.<sup>23</sup> With only aberrational exception, however, the Court has vigorously enforced the barriers between the political branches on the one hand and the judiciary on the other.<sup>24</sup> In part, this difference in treatment results from the fact that "the line dividing legislative and executive functions is blurred."<sup>25</sup> Moreover,

Congress and the President participate in the enactment of legislation, thereby assenting, on behalf of their respective branches, to any transfer of powers between them [citation omitted] . . . . The judicial function, on the other hand, is far more distinct, as judges have no role in the passage of legislation . . . .<sup>26</sup>

The difference also flows from the already noted fact that unlike Congress and the President, the federal judiciary is not directly accountable to public will.<sup>27</sup> Thus, because it is both easier and more important to enforce, the formal separationist principle has traditionally played a more crucial role in separation of powers issues that involve the judicial branch.

### B. The "Flexible" Model

Any approach to the separation of powers issue that simultaneously allows some degree of functional overlap among the branches, but imposes certain outer limits on that overlap could be generically described as a flexible model. This model includes two related but distinct subcategories: the ad hoc balancing approach and the functional approach. Under the former, the reviewing court weighs an interest in upholding the separation of powers

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23. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20, 329 (1936) (Court upheld congressional grant of authority to the President to issue Embargo Proclamation). In its most recent decisions prior to *Morrison* and *Mistretta*, however, the Court appeared to apply a rigid separationist approach, even in relations between the legislative and executive branches. See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (Congress may not exercise removal power over an officer who performs executive functions, except by impeachment); *INS v. Chadha*, 462 U.S. 919, 954-55 (1983) (Congress cannot execute laws except through its article I powers: invalidating legislative veto).

24. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982) ("Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws."). In *Northern Pipeline*, the Court recognized the independent nature of the judiciary and concluded that the "Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence." *Id.* at 60. See also *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1261 (9th Cir. 1988) ("Because judges must act—and be perceived to act—with complete impartiality in carrying out their responsibilities, the Constitution creates a wall of separation between the judiciary and the other branches; that wall is only seldom breached.").

25. *Gubiensio-Ortiz*, 857 F.2d at 1251 n.3.

26. *Id.*

27. See *supra* notes 11-16.



against some competing, often antithetical concern.<sup>28</sup> Under the latter, the court enforces separation of powers protections to invalidate only those overlaps of authority which either undermine one branch's successful performance of its essential function or accrete too much power to one of the branches.<sup>29</sup> Neither version of the flexible model, however, provides a workable or predictable standard by which to measure separation of powers principles.

Absent principled guidelines for its application, the ad hoc balancing approach amounts to an "anti-standard"—similar to Justice Stewart's "I know it when I see it"<sup>30</sup> standard—but in the context of separation of powers, rather than obscenity. Additionally, one may reasonably question the textual authorization for use of such a balancing process. Nothing in the language of article III suggests that the judicial power may be extended beyond the parameters of cases or controversies, simply because it appears convenient for the government to do so.<sup>31</sup> More importantly, as I have argued in a related context, any balancing between separation of powers interests, which are largely prophylactic in nature, and concrete competing social or political interests will invariably result in a finding that favors the latter, mainly because of the inherent difficulty in recognizing any direct or immediate harm flowing from an abandonment of separation of powers principles.<sup>32</sup>

The functional approach fares no better as a guide to the invocation of the separation of powers doctrine. Once again, the prophylactic nature of the protections is severely undermined by use of a functional approach. A particular breach of separation of powers, standing alone, may not appear to present a serious threat to our democratic structure. Yet it was presumably because it would be all but impossible to discover the appropriate tipping point that these protections were imposed in the first place.<sup>33</sup> Thus, while the formal separationist model may appear annoyingly inflexible in a number of ways, its advantages become more clear once one recognizes the Pandora's Box that is opened by inserting flexibility into the judicial separation of powers analysis.

### C. *The "Total Deferential" Model*

A third conceivable approach to the separation of powers issue would suggest either an extremely limited or nonexistent role for judicial review in such cases. Associated primarily with the controversial theories of Dean Jesse

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28. See *infra* notes 54-62 and accompanying text.

29. See *infra* notes 67-71 and accompanying text.

30. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

31. See *supra* notes 6-7 and accompanying text.

32. Redish, *Legislative Courts, Administrative Agencies and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 221-22.

33. See *supra* notes 11-16 and accompanying text.

Choper,<sup>34</sup> the total deferential model is premised on the assumption that judicial review in separation of powers matters unwisely expends the Supreme Court's preciously limited "institutional capital"<sup>35</sup>—or good will—that is needed more for the Court's performance of its essential role as protector of individual and minority rights.<sup>36</sup> Use of political capital in separation of powers cases, the theory proceeds, will result in that much less capital available for use in liberty cases.<sup>37</sup> This theory posits that while the branches of the federal government may adequately protect their own interests within the political marketplace, minority rights are uniquely in need of insulation by the counter-majoritarian judiciary.<sup>38</sup>

The deferential model is plagued with empirical and logical difficulties. Initially, one may reasonably question the theory's fundamental assumption of the fungibility—and therefore transferability—of institutional capital from one type of case to another.<sup>39</sup> And if the empirical basis for this assumption falters, then of course, the entire rationale for the deferential model falters.

Also questionable is the assumption that judicial review is unnecessary in separation of powers matters. It is not particularly helpful to assert that such review is unnecessary because the branches may protect themselves, when the very purpose of those constitutional protections in the first place was to assure that one branch would be unable to expand its power so greatly as to undermine the power of the other branches. Finally, the fundamental goal of the total deferential model—the desire to assure the protection of individual liberty—is undermined by the failure to enforce separation of powers protections, because those protections were themselves inserted largely as a means of protecting liberty against any overly powerful single branch of government. This is especially so in the case of the judicial branch, since any undermining of the judiciary's independence or integrity could seriously undermine its ability to protect individual liberty against encroachment by the majoritarian branches. In short, it is fallacious to view the various political values embodied in the Constitution as mutually independent. The disregard of one may seriously threaten another.

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34. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

35. Institutional capital refers to the public's confidence in, and acceptance of, the Court's constitutional decisions. Redish & Drizin, *supra* note 10, at 34 n.130.

36. J. CHOPER, *supra* note 34, at 64-65.

37. *Id.* at 139-40, 169.

38. *Id.* at 164-68.

39. See Redish, *Judicial Review and the "Political Question"*, 79 NW. U.L. REV. 1031, 1058-59 (1985).

It is difficult to imagine . . . that the widespread negative public reactions to *Miranda v. Arizona*, *Engle v. Vitale*, or *Roe v. Wade* would have been affected at all by the Court's practices on issues of separation of powers . . . Rather, public reaction in each seems to have focused on the specific highly charged issues of rights for criminals, prayer in public schools, and abortions. It is doubtful that the Court would have had a easier time if it had chosen to stay out of interbranch . . . conflicts.

*Id.* at 1058-59 (footnotes omitted).

### III. THE IMPACT OF *MORRISON* AND *MISTRETTA* ON JUDICIAL SEPARATION OF POWERS

The Court's decisions in *Morrison* and *Mistretta* are as puzzling and troubling, on a theoretical level, as their outcomes were predictable. In both, the Court upheld carefully structured congressional schemes of tremendous political importance; invalidation of either could have given rise to serious political repercussions. It is therefore not surprising—though perhaps less than commendable—that the Court strained to find both statutory schemes constitutionally legitimate. Yet the broader consequences of both decisions for separation of powers between the federal judiciary and the other branches are, at the least, problematic.

#### A. *Morrison v. Olson*

*Morrison* involved a constitutional challenge to the independent counsel provisions of the Ethics in Government Act of 1978.<sup>40</sup> Title VI of the Act allows for appointment of an independent counsel to investigate and, if appropriate, prosecute certain high-ranking government officials for violations of federal criminal laws.<sup>41</sup> The Attorney General is required, under appropriate circumstances, to conduct a preliminary investigation, and to report to a specially created article III court, the "Special Division," established for the purpose of appointing independent counsels.<sup>42</sup> The Court upheld the Special Division's authority to appoint the independent counsel, because it found that express authorization of such a power in article II's "appointments clause"<sup>43</sup> constituted a supplement to the judiciary's adjudicatory power under article III.<sup>44</sup>

More troublesome, however, was the vesting in the Special Division of "various powers and duties in relation to the independent counsel that, because they do not involve appointing the counsel or defining her jurisdiction, cannot be said to derive from the Division's Appointments Clause authority."<sup>45</sup> These included such activities as the power to grant extensions for the Attorney General's preliminary investigation,<sup>46</sup> the power to receive

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40. 28 U.S.C. §§ 591-99 (1982 & Supp. V 1987).

41. *Id.* § 593.

42. *Id.* § 592.

43. The Appointments Clause of article II provides that, although the President normally shall make appointments, "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2.

44. *Morrison*, 108 S. Ct. at 2608-11. The Court supported its argument by referring to the judiciary's power to appoint private attorneys to act as prosecutors in judicial contempt cases, *Young v. United States*, 481 U.S. 787, 793 (1987); *United States commissioners, Go-Bart Importing Co. v. United States*, 282 U.S. 344, 353 n.2 (1931); and federal marshals, *Ex parte Siebold*, 100 U.S. 371, 397 (1879). *Morrison*, 108 S. Ct. at 2611.

45. *Id.* at 2613.

46. 28 U.S.C. § 592(a)(3) (1982 & Supp. V 1987).

the Attorney General's report after the preliminary investigation,<sup>47</sup> and the authority to receive the independent counsel's report on expenses.<sup>48</sup> But the Court nevertheless upheld these powers, ruling that:

The Act simply does not give the Division the power to "supervise" the independent counsel in the exercise of her investigative or prosecutorial authority. And the functions that the Special Division is empowered to perform are not inherently "Executive"; indeed, they are directly analogous to functions that federal judges perform in other contexts . . . .<sup>49</sup>

Such a conclusion is not necessarily inconsistent with a formal separationist position, even though the Court was upholding the judiciary's performance of functions not even remotely tied to adjudication of a particular case or controversy. One might, not unreasonably, fashion a type of common sense *de minimis* exception for performance of incidental administrative duties. On the other hand, while recognition of such administrative authority might be deemed consistent with the formal separationist model when it is incidental to the performance of traditional judicial functions—for example, the hiring of law clerks or the organization of informational seminars—no such claim could be made for the administrative authority exercised by the Special Division. Thus, the Court's rationalization based on the analogy between the administrative duties performed on behalf of the independent counsel and those conducted as a facilitator for performance of the adjudicatory function does not withstand analysis.

Even more difficult to justify was the Special Division's statutory power to terminate the office of independent counsel.<sup>50</sup> While the Court conceded that such a power is "administrative" and "not a power that could be considered typically 'judicial,'"<sup>51</sup> it ultimately chose not to "view this provision as a significant judicial encroachment upon executive power or upon the prosecutorial discretion of the independent counsel."<sup>52</sup> The Court explained its conclusion in the following manner:

[I]t is the duty of federal courts to construe a statute in order to save it from constitutional infirmities. . . . The termination provisions of the Act do not give the Special Division anything approaching the power to *remove* the counsel while an investigation or court proceeding is still underway. . . . "[T]ermination" may occur only when the duties of the counsel are truly "completed". . . . It is basically a device for removing from the public payroll an independent counsel who has served her purpose, but is unwilling

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47. *Id.* §§ 592(b)(1), 593(c)(2)(B).

48. *Id.* § 594(h)(1)(A).

49. *Morrison*, 108 S. Ct. at 2613-14. The Court provided examples of analogous, discretionary functions performed by federal judges. These included deciding whether to allow disclosure of matters occurring before a grand jury, FED. R. CRIM. P. 6(e); deciding whether to extend a grand jury investigation, FED. R. CRIM. P. 6(g); and, deciding whether to award attorney fees, *e.g.* 42 U.S.C. § 1988 (1982). *Morrison*, 108 S. Ct. at 2614.

50. 28 U.S.C. § 596(b)(2) (1982 & Supp. V 1987).

51. *Morrison*, 108 S. Ct. at 2614.

52. *Id.*

to acknowledge the fact. So construed, the Special Division's power to terminate does not pose a sufficient threat of judicial intrusion into matters that are more properly within the Executive's authority to require that the Act be invalidated as inconsistent with Article III.<sup>53</sup>

Regardless of what one thinks of the Court's justification, there can be little doubt that the analysis departs dramatically from a formal separationist model.<sup>54</sup> In its place, the Court employs a conclusory and unpredictable type of ad hoc balancing analysis.<sup>55</sup> Use of such vague and unexplained terms as "sufficient" underscores this fact.<sup>56</sup>

Difficulties with the Court's analytical approach, however, go considerably beyond the simple use of a wholly subjective test. Initially, the Court's attempt to characterize the Special Division's authority to terminate the independent counsel as somehow an objective, almost ministerial act, is absurd. Surely, it is not inconceivable that reasonable people could differ over whether the work of a particular independent counsel is "completed." Thus, the Special Division's power to overrule the independent counsel's own considered judgment on the issue might well represent a significant interference with executive branch discretion.

Even more deplorable is the fact that the Court's analysis completely missed the point of article III's separation of powers protections. For important reasons of political theory,<sup>57</sup> article III confined the judiciary's authority to the adjudication of live cases or controversies. Whether or not the Special Division's power to terminate substantially interfered with executive discretion, the fact remains that the function was in no way related to adjudication of a live, adversarial "case."<sup>58</sup> Nor could it reasonably be analogized to any internal administrative tasks traditionally performed by the judiciary. Thus, the Court in *Morrison* failed to recognize what the real separation of powers issue was. It was not merely that the judicial branch might be improperly interfering with the executive branch; rather, it was that the judicial branch had been legislatively directed to perform a nonjudicial function. That the Court found the former issue not to be a problem fails to resolve the latter issue. *Morrison* then, totally omitted recognition—much less careful analysis—of the key separation of powers difficulty in the Special Division's authority to terminate the independent counsel's tenure.

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53. *Id.* at 2614-15 (emphasis in original).

54. *See Morrison*, 108 S. Ct. at 2628 (Scalia, J., dissenting). Justice Scalia argued that whether the executive branch retained sufficient control of the independent counsel was irrelevant for separation of power purposes; any loss of control was too much. Justice Scalia also considered irrelevant the fact that the executive branch's control over the independent counsel was not vital to the functioning of the executive branch. The Constitution requires that all purely executory duties be performed by the executive branch. *Id.*

55. *Id.* at 2629-30.

56. *Morrison*, 108 S. Ct. at 2615.

57. *See supra* notes 11-16 and accompanying text.

58. *See supra* note 9.

Even if one were to accept the premise that use of an ad hoc balancing analysis may legitimize a prima facie violation of article III's case-or-controversy requirement,<sup>59</sup> presumably the Court first must examine the competing harms of adhering to or abandoning that requirement. Such a balancing process—unless it effectively amounts to little more than total judicial abdication<sup>60</sup>—should inquire whether there exist alternative means of accomplishing the legislative goal. In the case of the independent counsel provisions, it is at least conceivable that a nonarticle III judicial body—or “legislative court”<sup>61</sup>—could have performed the termination function almost as effectively as an article III court. But because the Court viewed the separation of powers issue in such an artificially truncated fashion,<sup>62</sup> it never even reached the question of other possible but less invasive alternatives.

### B. *Mistretta v. United States*

In an attempt to put an end to perceived inequities and disparities in federal criminal sentencing, Congress in 1984 established the United States Sentencing Commission, with the mandate to promulgate binding sentencing guidelines on the basis of specified criteria.<sup>63</sup> By statutory directive,<sup>64</sup> at least three members of the Commission were required to be article III federal judges. By a vote of eight to one,<sup>65</sup> the Court in *Mistretta* rejected separation of powers challenges to the Commission and its composition.<sup>66</sup>

As in *Morrison*,<sup>67</sup> the *Mistretta* Court employed a vague and conclusory form of ad hoc balancing analysis to the issue of judicial separation of powers. Rather than draw a strict demarcation between the performance of judicial and nonjudicial functions, the Court expressed a willingness to invalidate separation of powers breaches only when they “either accrete to a single branch powers more appropriately diffused among separate branches or . . . undermine the authority and independence of one or another coordinate branch.”<sup>68</sup> Such a test is all but unworkable, since virtually by definition the vesting of purely legislative or executive power in the judicial branch “accretes” power to that branch, and it is extremely difficult to determine, on a case-by-case basis, that a specific breach of separation of

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59. *But see supra* notes 30-32 and accompanying text.

60. Such total judicial abdication would be equivalent to the total deferential model. *See supra* notes 34-39 and accompanying text.

61. *See generally*, Redish, *supra* note 32, at 201 (distinction between two types of non-article III bodies, legislative courts and administrative agencies, is superficial).

62. *See supra* notes 55-60 and accompanying text.

63. 28 U.S.C. §§ 991-998 (Supp. V 1987).

64. *Id.* § 991(a).

65. As in *Morrison*, Justice Scalia voiced the sole dissenting opinion. *Mistretta*, 109 S. Ct. at 675 (Scalia, J., dissenting).

66. *Mistretta*, 109 S. Ct. at 671.

67. *See supra* notes 45-62 and accompanying text.

68. *Mistretta*, 109 S. Ct. at 659-60.

powers undermines one branch's "authority and independence." It is arguable that use of such a flexible guideline is necessary in applying separation of powers principles between the political branches.<sup>69</sup> However, the relative ease in applying article III's case-or-controversy requirement and the important distinctions drawn in American political theory between the role of the judiciary and the other branches<sup>70</sup> makes use of a flexible approach both unnecessary and unwise.

While one may reasonably reject the *Mistretta* Court's analytical model, the Court noted several specific factors concerning the use of article III judges on the Commission which arguably distinguished the situation and therefore conceivably limited the decision's reach.<sup>71</sup> Careful analysis reveals, however, that none of these specific factors justifies the upholding of the Commission's breach of the case-or-controversy requirement.<sup>72</sup>

The most important of these factors cited by the Court is also the most dubious. The Court noted that

[p]rior to the passage of the Act, the Judicial Branch, as an aggregate, decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances. It was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that came before them. The Sentencing Commission does no more than this, albeit basically through the methodology of sentencing guidelines, rather than entirely individualized sentencing determinations.<sup>73</sup>

The obvious fallacy in the Court's reasoning can be seen when its argument is paraphrased: use of federal judges on the Commission does not violate the case-or-controversy requirement, because the tasks of the Commission and of the federal courts are identical, except for the absence of a case or controversy in the work of the Commission. The key difference between the two situations, of course, is that prior to the Commission's creation, judges performed the sentencing task *in the context of live, individualized cases*.<sup>74</sup>

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69. See *supra* notes 2, 23 and accompanying text.

70. See *supra* notes 11-16 and accompanying text.

71. The Court recognized the following factors as mitigating against any possible undermining of the judiciary's independence: first, the Commission's powers were not "united with the power of the Judiciary in a way that has meaning for separation of powers analysis"; second, the placement of the Commission in the judicial branch neither increased the judiciary's authority nor decreased the authority of the executive branch; third, the substantive work performed by the Commission was consistent with prior functions of the judiciary; and fourth, the Guidelines did not "involve a degree of political authority inappropriate for a nonpolitical branch." *Mistretta*, 109 S. Ct. at 665-67.

72. It should be noted that the *Mistretta* Court saw two distinct separation of powers issues: the location of the Commission within the judicial branch, *id.* at 661-67, and the Commission's composition, *id.* at 667-73. Ultimately, however, the overriding conceptual separation of powers issues appear to be fungible.

73. *Id.* at 666.

74. Whether an issue is "live" for purposes of adjudication is usually determined by the doctrine of mootness. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

The Commission, on the other hand, promulgates binding, generalized guidelines, divorced from the setting of a specific case, much as a legislature would.

The essential point that seems to have been ignored by the Court is that the case-or-controversy requirement does not turn on the *substance* of the judiciary's task, but rather on the presence of the adjudicatory *form*—the very difference between judicial sentencing and the Commission's work. To underscore the point, could anyone imagine that a law directing the federal judiciary to promulgate binding regulations enforcing the first amendment right of free speech could survive examination under the case-or-controversy requirement, on the grounds that the judiciary has traditionally developed the substance of first amendment law in the context of live cases? Such logic would of course be rejected, if the case-or-controversy requirement is not to be rendered a dead letter. Yet the Court's reasoning in *Mistretta* effectively amounts to the very same questionable logic.

A second argument relied on by the *Mistretta* Court was that no specific "court" had been delegated the power to promulgate sentencing guidelines. Rather, the law directed that individual article III judges were to be made members of the Commission.<sup>75</sup> The Court emphasized this distinction,<sup>76</sup> citing the long tradition of Supreme Court Justices' service in nonjudicial capacities<sup>77</sup> and noting that "[t]he text of the Constitution contains no prohibition against the service of active federal judges on independent commissions such as that established by the Act."<sup>78</sup>

Ultimately, the Court's argument fails, because it ignores the primary values served by the case-or-controversy requirement, and thus effectively amounts to a preference of form over substance. If we assume that the vesting of nonjudicial authority in a particular article III court would be held to violate the case-or-controversy requirement, it is difficult to imagine

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Just as the case-or-controversy limitation serves two purposes, "mootness has two aspects: 'when the issues present are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" *Id.* at 396 (citing *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

75. 28 U.S.C. § 991(a) (Supp. V 1987).

76. *Mistretta*, 109 S. Ct. at 667-71.

77. *Id.* at 668-69. The Court provided numerous examples of judges holding extrajudicial positions. For example, Chief Justice Jay served as Ambassador to England during his tenure on the Court. *Id.* at 668. Chief Justice Ellsworth served simultaneously as Minister to France, and Chief Justice Marshall headed the Court while serving concurrently as Secretary of State. *Id.* Five Justices served on the Election Commission to resolve the disputed 1876 presidential election. *Id.* at 669. Justices Nelson, Fuller, Brewer, Hughes, Day, Roberts and Van Devanter served on orbital commissions, while Justice Roberts served on a commission that investigated the attack on Pearl Harbor. *Id.* Justice Jackson served as a prosecutor at the Nuremberg trials. *Id.* Finally, Chief Justice Warren chaired the commission that investigated the assassination of President Kennedy. *Id.* Chief Justice Jay, the first Chief Justice, felt that extrajudicial service was permissible as long as it was "consistent and compatible" with the judicial function. 2 G. McREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 293, 294 (1949), cited in *Mistretta*, 109 S. Ct. at 668 n.22.

78. *Mistretta*, 109 S. Ct. at 667.



that the article III problem would disappear if the legislation were instead to create a nonjudicial commission whose membership happened to consist of all of the judges of that article III court. Burdening article III judges with administrative tasks could simultaneously undermine the prestige of those judges and distract them from the effective performance of their adjudicatory task. It is presumably, in part, for these reasons that the case-or-controversy requirement was imposed in the first place.<sup>79</sup> Thus, it should matter little, for article III purposes, whether the nonjudicial authority is vested directly in an article III court or in a nonarticle III body whose membership by law consists, at least in part, of article III judges.

The Court itself acknowledged the fact "[t]hat the Constitution does not absolutely prohibit a federal judge from assuming extrajudicial duties does not mean that every extrajudicial service would be compatible with, or appropriate to, continuing service on the bench. . . . The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch."<sup>80</sup> Ultimately, then, the Court appears to have abandoned its own suggested distinction between nonjudicial activities by courts on the one hand and by individual judges on the other,<sup>81</sup> for the Court tests both by much the same nebulous functional balancing analysis. But the Court's failure to provide any principled basis for application of this test<sup>82</sup> underscores the probable reasons that the text of article III provides for no exceptions to its case-or-controversy requirement: it is simply impossible to discern, on a case-by-case basis, whether a particular breach of the case-or-controversy requirement substantially undermines the values served by judicial separation of powers.

#### IV. REDIRECTING THE JUDICIAL SEPARATION OF POWERS INQUIRY: IMPLICATIONS FOR THEORY AND PRACTICE

If the abstract theoretical critique did not convince an objective observer of the dangers of the application of a flexible model to the issue of judicial separation of powers,<sup>83</sup> examination of the use of such a model in the *Morrison* and *Mistretta* decisions should have. But if one categorically rejects a flexible model, in either its balancing or functional forms, one must develop an acceptable alternative approach. It could be persuasively argued that this is not an easy task.

The most logical alternative is resort to the formal separationist model.<sup>84</sup> As already noted,<sup>85</sup> while such an approach might well be both unworkable

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79. See *supra* note 9. See also 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 430 (1911) (Madison wrote that the courts' jurisdiction should be limited to cases of a judicatory nature).

80. *Mistretta*, 109 S. Ct. at 671.

81. See *supra* notes 75-78 and accompanying text.

82. See *supra* notes 67-70 and accompanying text.

83. See *supra* notes 28-33 and accompanying text.

84. See *supra* notes 22-27 and accompanying text.

85. See *supra* note 23.

and inadvisable for separation of powers among the legislative and executive branches, on both counts it might be more appropriate for the issue of judicial separation of powers. However, the argument could be made that even within the judicial framework, such a rigid functional dichotomy defies common sense. There are numerous incidental administrative tasks which either the judicial branch as a whole or individual judges need to perform to enable the federal judiciary to function effectively. Any approach which precluded performance of these tasks could be deemed so impractical as to be unacceptable.

It is not necessarily anomalous, however, to incorporate elements of common sense into an otherwise rigid formalist approach. Nor would recognition of such exceptions necessarily lead to use of an unformed ad hoc balancing analysis that would justify such breaches of the case-or-controversy requirement as took place in *Morrison* and *Mistretta*. One could reasonably fashion a rule that confines the governmental role<sup>86</sup> of article III courts and judges to the adjudication of live cases or controversies, and to *the performance of all administrative tasks incidental and directly related to the effective performance of the adjudicatory function*. As is the frequent occurrence with any constitutional rule, close cases will arise which will be difficult to categorize under this standard. But a minimum level of uncertainty in application should not be allowed to disqualify a particular rule, lest we be bereft of all such rules.

Most importantly, the suggested separation of powers rule provides a relatively clear guide for future application. Clearly excluded would be nonjudicial tasks which, instead of incidentally facilitating the adjudicatory function, bypass that function and instead result in the creation of legally binding rules which operate directly upon society. Such functions amount either to the promulgation of legislation—generalized rules of law not developed in or evolved from the process of case adjudication—or the performance of a purely executive function—the alteration of social relations or individual status in a specific fact situation, once again divorced from an adversarial adjudication. In both instances, the key is that performance of a nonjudicial task operates directly and immediately beyond the confines of the judicial branch. Thus, it should not be difficult to distinguish between such acceptable tasks as the hiring of law clerks or the arrangement of educational seminars—functions ancillary to the effective performance of the adjudicatory function that lead to no direct, legally binding effect on society—and the decision to terminate an independent counsel's term or to determine the most appropriate sentences for particular federal crimes.

The most far-reaching impact of the adoption of the suggested separation of powers analysis, other than the reversal of the relevant portions of the decisions in both *Morrison* and *Mistretta*, would be on the constitutionality

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86. There is, of course, no basis for construing article III to prohibit a judge's voluntary decision to assume private nonjudicial positions. *Mistretta*, 109 S. Ct. at 668-69.

of the Rules Enabling Act.<sup>87</sup> Pursuant to that Act, the Supreme Court, no longer limited by the requirement of congressional approval,<sup>88</sup> is authorized to promulgate the Federal Rules of Civil Procedure and Evidence.<sup>89</sup> While the Act has been upheld against certain challenges,<sup>90</sup> the Supreme Court has never directly ruled upon the Act's constitutionality under the case-or-controversy requirement.<sup>91</sup>

As established as the Court's actions under the Enabling Act are, it is difficult to understand how they could withstand constitutional analysis under the modified formal separationist model advocated here. Initially, there is no doubt that the promulgation of the Federal Rules cannot be conceptualized as part of the case adjudication process; the entire procedure is conducted without any connection to resolution of a particular live controversy. Second, the process should not be viewed as ancillary to the adjudicatory process. It is true that both the Federal Rules of Civil Procedure and Evidence are utilized by the federal courts in the course of adjudication, but such decisions could just as easily be resolved by the courts in the course of particular adjudications, as part of the common law process. It is therefore not necessary that such rules be developed divorced from the adjudicatory proc-

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87. 28 U.S.C.A. § 2072 (West 1982 & Supp. 1989). As amended, the Rules Enabling Act provides:

- (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
- (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

*Id.*

88. Prior to its amendment in 1988, the Rules Enabling Act provided that the Federal Rules of Civil Procedure were to be promulgated by the Supreme Court, and that they would go into effect unless, within 90 days of their reporting by the Chief Justice to Congress, congressional action was taken to prevent such a result. 28 U.S.C. § 2072 (1982). Under the current statutory framework, once the Court promulgates new rules such as the Federal Rules of Civil Procedure they are immediately binding. 28 U.S.C.A. § 2072 (West 1982 & Supp. 1989).

89. 28 U.S.C.A. § 2072 (West 1982 & Supp. 1989).

90. For example, in *Hanna v. Plumer*, 380 U.S. 460 (1965), Congress' authority to delegate power to the Supreme Court was challenged. *Id.* at 471-72. Nevertheless, the Court found that "the constitutional provision for a federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts . . ." *Id.* at 472. See also *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating [to the Supreme Court] or other federal courts authority to make rules").

91. In *Mistretta*, the Court cited *Sibbach & Co. v. Wilson*, 312 U.S. 1 (1941), as upholding the constitutionality of the Enabling Act. *Mistretta*, 109 S. Ct. at 662. In fact, the Court reached no decision on the constitutionality of the Act. No mention of a possible inconsistency with article III's case-or-controversy requirement was even mentioned, much less resolved. Instead, the case merely found Rules 35 and 37 of the Federal Rules of Civil Procedure, concerning mental and physical examinations as part of discovery, consistent with the dictates of the Enabling Act. *Sibbach*, 312 U.S. at 9-16.

ess. The same cannot be said of such incidental administrative tasks as the hiring of secretaries or law clerks.

Finally, and most importantly, the Federal Rules have consequences far beyond the internal workings of the federal court system. They operate on all litigants, with the binding effect of law. In fact, prior to the recent revision of the Enabling Act,<sup>92</sup> but for the differences in the process of promulgation, the Rules were equivalent to legislation. Following those revisions, the Rules *are* legislation, and the Court's function in the process would now seem to be little more than to recommend legislation.<sup>93</sup> Thus, in promulgating the Rules for congressional approval, the Court is inherently intertwined in the legislative process. One could reasonably ask, what activity could represent a more striking departure from the traditional judicial function of case adjudication than the direct enactment of legislation?

It has been suggested that the saving factor for the Rules Enabling Act—one that arguably distinguishes it from the more questionable use of federal judges on the Commission—is that the Act's impact is procedural, rather than substantive.<sup>94</sup> In other words, since by its terms the Enabling Act requires that the Rules be in some sense procedural,<sup>95</sup> and since the Court in *Erie Railroad Co. v. Tompkins*<sup>96</sup> construed the Constitution to prohibit the promulgation of purely substantive federal common law rules, the Court's recommendation of the Rules is more easily viewed as ancillary to the judicial function.<sup>97</sup> This logic, however, mixes apples and oranges. The substantive-procedural distinction is today relevant,<sup>98</sup> if at all, for purposes of federalism, not separation of powers.

Whatever one thinks of Justice Brandeis' constitutional logic in *Erie*,<sup>99</sup> there can be no doubt that Congress itself, in the Enabling Act, has imposed such a limitation to matters of procedure on the Federal Rules. But the concern behind this requirement cannot be for preservation of the separation of the branches, since whether the Rules deal with procedure or substance logically has nothing to do with whether the Supreme Court has performed a judicial function in the recommendation of the Rules. As noted previously,<sup>100</sup> such an issue is resolved by examination of the form of the law creation process, not its substance.

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92. See *supra* note 88.

93. See *supra* note 88.

94. See *Gubiensio-Ortiz v. Kanahale*, 857 F.2d 1245, 1256-57 (9th Cir. 1988). It should be noted, however, that the court there merely assumed the constitutional validity of the Enabling Act, and attempted to distinguish the Sentencing Commission. *Id.*

95. 28 U.S.C.A. § 2072(a) (West 1982 & Supp. 1989).

96. 304 U.S. 62 (1938).

97. *Gubiensio-Ortiz*, 857 F.2d at 1256-57.

98. One might argue that in light of the extremely broad congressional authority to legislate in virtually any area, there today exists no congressional power to authorize federal courts to supplant state substantive law. See, e.g., *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985) (enforcing the Fair Labor Standards Act as applied to local mass transit).

99. *Erie R.R. Co. v. Tompkins*, 304 U.S. 62 (1938).

100. See *supra* discussion in text following note 72.

It might be argued that the confining of the Rules to procedural matters reduces separation of powers tensions, because the Court is uniquely qualified to decide such matters. But once again, the argument misses the point of the separation of powers inquiry. The Court also possesses great expertise on issues of free speech, equal protection, and due process. Surely it does not follow that on that basis the Court is empowered—or that Congress is authorized to empower the Court—either to promulgate or to formally give advice on legislation on such subjects.<sup>101</sup> As in these areas, then, if Congress wishes to benefit from the Court's expertise on matters of procedure, separation of powers principles embodied in the case-or-controversy requirement dictate that the Court be allowed to develop procedural rules through the common law adjudicatory process, as is the case for all procedural matters not directly dealt with in the Rules. Congress, of course, may choose to preempt that process through the adoption of legislation regulating matters of procedure,<sup>102</sup> but if so, it should not be with the Court acting as an auxiliary legislature.

#### V. CONCLUSION

It is true, of course, that the use of an article III court to supervise the termination of an independent counsel's tenure or the placing of three federal judges on the Sentencing Commission do not, standing alone, amount to an end to the democratic system as we know it. Criticism of *Morrison* and *Mistretta* might therefore be thought to be little more than a tempest in a teapot.

But it should not be forgotten that the constitutional guarantee of separation of powers is fundamentally a prophylactic protection of constitutional democracy. It therefore makes sense to prohibit *any* breach of the constitutional limitation of judicial authority to the adjudication of live cases, recognizing only common sense exceptions for the performance of the minimal administrative tasks essential to the effective performance of the adjudicatory function. While recognition of such an exception may leave some room for erosion and manipulation, principled grounds of limitation exist that reduce this danger.<sup>103</sup> Whatever the scope of that exception, it could not reasonably be construed to justify judicial performance of the starkly executive and legislative functions assigned to article III judges upheld in *Morrison* and *Mistretta*.

It would be unrealistic to deny that the federal judiciary performs an important political function within our system. But if separation of powers—

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101. See, e.g., *Mistretta*, 109 S. Ct. at 680 (Scalia, J., dissenting) (majority's opinion sets an "undemocratic precedent" and would allow "all manner of 'expert' bodies" to emerge and function irrespective of the political process).

102. See, e.g., 28 U.S.C. § 1291 (1982) (concerning final decisions of district courts in Panama Canal Zone).

103. See *supra* text accompanying notes 84-86.

indeed, the democratic norm underlying an important segment of American political theory<sup>104</sup>—is to mean anything, that political function must be performed within the confines of the traditional adjudicatory function.<sup>105</sup>

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104. See *supra* notes 11-16 and accompanying text.

105. It should be emphasized, however, that acceptance of this view does not necessarily lead to the Supreme Court's rigid "injury-in-fact" requirement for standing under article III. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). One could satisfy the case-or-controversy requirement, as long as a real dispute between interested, adversarial parties existed, that could be resolved by judicial decision. See *Flast v. Cohen*, 392 U.S. 83, 99-101 (1968). See generally Redish, *The Passive Virtues, the Counter-majoritarian Principle, and the "Judicial-Political" Model of Constitutional Adjudication* (forthcoming in the 1990 volume of the *Connecticut Law Review*).

